



Harlan Fiske Stone (front and center) at a 1938 reunion with his clerks. Warner Gardner is at the far left in the back row.



# Pebbles From The Paths Behind

PREFACE & CHAPTER V

*Warner W. Gardner*

**P**REFACE: THERE IS PROBABLY NO form of prolonged vanity that quite equals the memoir. It is as though Narcissus had lingered for a calendar year on the bridge, watching the effect of the seasonal changes in light and water upon the reflection of his lovely countenance.

Yet, one may well speculate, it would be wrong to call that year wasted if Narcissus had no destination, no work to perform, to call him from the bridge. So, too, one past his 80th birthday does not have so many competing demands upon his time as he might like.<sup>1</sup>

I have not, however, been driven to this massive undertaking simply to avoid tedium.<sup>2</sup> I have, instead, been drawn to it because it is remarkably good fun. The natural pleasures in remembering one's youth are heightened because, when the raw facts are retrieved through the mists of time, they have become smoothed and prettied.

Indeed, any reader should be warned that he is not presented Fact, but only what I now believe to be fact. There are likely to be differences between the two. One, common to all aged narrators, is that memory fades and events are blurred. Another, common to all ages, is that, as plants bend toward the sun, so memories reorient themselves toward that image of himself most pleasing to the narrator. A third source of distortion is not quite so common: if an elision or a modest revision of the event is likely to heighten its comic or paradoxical quality, I tend within a relatively short time to believe that the improved version is what actually happened.

I had initially thought that I could keep this memoir as a secret vice. But confining it to my own hands has proved to be as difficult as holding an eel. I found myself presenting the first draft to one wife, four children, one brother, two partners and one

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1 I have four pages dated September 1982, when I had started down this same road. A heavier work schedule then caught up with me, resulting in a five and a half year pause. There has been no such gratifying imperative to abort this renewed assault on the past.

2 I note, however, with appropriate pride that every word has been typed and initially printed by my own erratic fingers; the recurrent difficulties are admirably designed to replace tedium with frustration.

neighbor. I cannot predict who if any may be added to that group of nine when the second and presumably final draft is completed. I have in any case addressed these pages to a sharply defined audience: it is me.<sup>3</sup> One finds, I may note, a relaxing freedom from exacting standards when he is in an hermaphroditic condition of conjoined author and reader.

I have not, however, carried the no-reader-but-me guideline so far as to risk anguish if another reads the manuscript. I have no doubt that love and sex, wife and children, are more important parts of a life than are professional and educational activities. But these are not matters about which any of Anglo-Scot descent is going to talk. We hire poets to do that sort of thing, and don't expect it of attorneys.

Footnotes are like wolves in being held in wide and unfounded disfavor.<sup>4</sup> I have for a lifetime used them (a) to present additional material, or to give myself idle amusement, that would be distracting in the text, or (b) to grapple with adverse cases and authorities which candor requires citation while prudence dictates obscurity. As I felt no obligation to summon up my misdeeds and embarrassments, there was no occasion to minimize them by footnote treatment. I have, therefore, been attentive only to the first reason for footnotes.

It will be observed that this volume is directed to the years before I entered private practice. If I should press on to the period of private practice, the second volume would be substantially smaller. Yet I have spent

42 years in private practice as compared to only 13 in Government service. The disproportion in text probably reflects at least in part the fact that things seem more important when hearts are young and minds not dulled by experience. The other part of the reason is the sobering fact that the thirteen years probably contained more significant or interesting events than the subsequent forty-two.

I have, in sum, undertaken to recount a lengthy history of modest and long distant events which is often of doubtful accuracy. The events have been selected and their narration has been shaped to meet no standard other than my own. I fear, too, that the unvarying focus of each account will be the author; history may on occasion have swirled about my shoulders but it appears in the pages which follow only insofar as it relates to Gardner. That solipsism, however, I believe to be the essential nature of any memoir.<sup>5</sup> This one follows [chapters I through IV are not reproduced here]:



## Chapter v: The Supreme Court

### A. *The Working Environment*

I came to Washington at the beginning of August, 1934, in order to work on the accumulated petitions for writs of certiorari before Stone's return. My predecessor, Howard Westwood, spent a day or maybe two in perfunctory training and then went on

3 Pogo's immortal report – "we have met the enemy, and they are us" – has for a half-century past put an end to any undeviating requirement that the nominative case be used after the verb "to be".

4 The disfavor is sometimes professional as well as popular. Ken Davis recently told me with pride that his latest treatise on administrative law had no footnotes. Sure enough, it didn't, with the result that useful elaborations of authorities were omitted, while much material that in a footnote could be skipped was forced on the reader's attention.

5 I am reminded of Carl McGowan's comment on a friend's autobiography: "George looked back, and liked what he saw."

his way.<sup>6</sup>

The October Term 1934 was the last before the Court moved into its own courthouse, the marbled monument which now seems as solid and as old as the republic itself. The court sessions were then held in the old Senate chambers, a comparatively small room in the Capitol. The clerk's and marshal's staffs and the library were in adjacent and highly congested space. There was, however, no room for the Justices, each of whom accordingly worked in his home. This dispersion served effectively to discourage collegial discussion of decisions or opinions, though it is only fair to say that common quarters have not, from 1935 onward, done much to promote the goal of collegial harmony.

History was, however, a little more tangible when encased in worn mahogany rather than glistening marble. On my arrival the Clerk said that I could use a desk that was along one side of the courtroom, and advised me that it had originally been John Marshall's. I sat for a bit in awed wonder at my fortuitous entry

into the pantheon of the nation's law, and then succumbed to the temptation to look inside. I did not find an early draft of *McCullough v. Maryland*, or any similar fragment of history left in the venerable desk. Instead I found, or was found by, the biggest, meanest cockroach that I had ever seen. Well, I thought, so much for history, and started work on my first cert.

Harlan Stone had been simultaneously Dean of Columbia Law School and a senior partner at Sullivan & Cromwell. He was, in consequence one supposes of the latter occupation, quite wealthy when he came to Washington as Coolidge's Attorney General and then Court appointee. This permitted him to build



The Old Senate Chamber, in which the Supreme Court sat from 1860 to 1935.

a home with annexed chambers. One side of the house was given over to an enormous room, perhaps 50' x 25', lined with bookshelves and two stories in height. At one end were two small inner rooms for Stone's secretary and messenger,<sup>7</sup> with an open balcony above them where the clerk worked. There was occasional conversation, in a slightly raised voice, between the Justice, at the other

6 Howard had been an outstanding student in the class behind me at Swarthmore. He was expelled from college at the end of his junior year, for being a few years in advance of the then current mores, and entered Columbia Law School – with strong help from the Swarthmore faculty – in place of his senior year. With my own detour through Rutgers he ended up a year ahead of me at Columbia. He went from Stone to Covington & Burling, where he spent a successful professional life. Although we have accordingly spent almost two-thirds of a century in close proximity neither has ever been notably fond of the other.

7 When the Justices worked at their homes the messengers often seemed more important than the clerks; there was a constant flow of mail and case documents from and to the clerk's office, a daily requisition of research books from the Library of Congress, chauffeuring the Justice to and from Court, passing cake at tea parties, etc.

Justice Brandeis had a messenger with whom I became rather well acquainted. That was because I usually ate lunch at a nearby drug store at the time that he had his free hour. Brandeis was insistent that his mail be picked up and brought to him immediately after both the morning and the afternoon delivery to the Court. His messenger, long before my day, had concluded that nothing bad would happen, either to the world or to him, if he picked up the mail each morning, divided it in half, and saved half to serve as the afternoon delivery.

end of the room, and his clerk; there was also constant mutual observation, which I found rewarding when it was conducted from balcony to judicial desk, and unnerving when the path was reversed.

One of the bookshelves would pivot, I sometimes thought unfortunately, and open a passageway into the drawing room. The pre-war custom was for Supreme Court wives to be “at home” for Monday tea.<sup>8</sup> I was supposed to assist Agnes Stone, and I hated it. I have never had any aptitude for small tea party talk, and it was doubly bad when one was 50 years younger than the guest to whom he was being gracious, and when disaster might follow upon the normal opening question “And what do you do?”

I had the feeling that Mrs. Stone for her part was gritting her teeth, living partly on memories of the charming Walter Gellhorn and partly in anticipation of the next clerk. The latter proved to be a delusive hope, since I doubt that Tom Harris had any more natural talent for a tea party than did I. Mrs. Stone used to come into the library and declare firmly, “I smell smoke in the drapes,” Stone would reply loyally, “I don’t,” and she

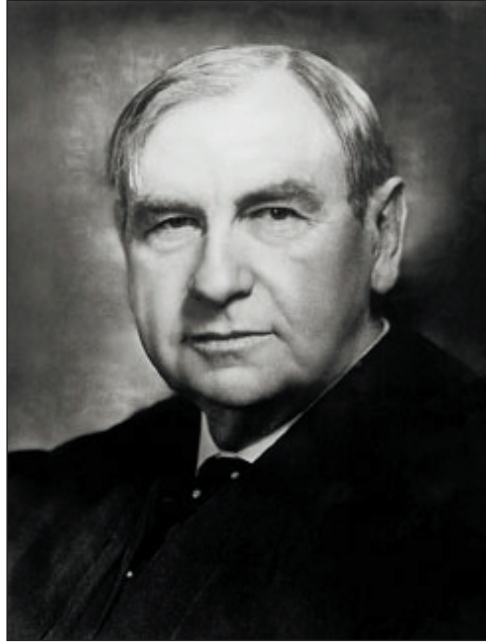
would stomp out. She was pleasant enough on the half-dozen occasions when I ate a meal with them, but it remained reasonably evident that she considered that Harlan had been short-changed by Columbia.

The law clerk of 1934 was a hermit when compared to those of the current period. I never met the long term clerks, and had only occasional social contact (never professional) with my two transitory colleagues: Nat Nathanson with Brandeis and Bill Stroock with Cardozo. Today there seem to be three dozen clerks milling about the Supreme Court corridors, usually serving four to a justice, many of whom

are far more confident than were we that the future of the Court, if not of the nation, rests on their shoulders.<sup>9</sup>

### B. The Work

One of the principal duties of the Stone clerk was the preparation of memoranda on certiorari petitions. These were typed on one page, or occasionally two, of 5" × 8" paper and slipped under the rubber band holding together the printed papers in the case.



Harlan Fiske Stone  
Associate Justice 1925–1941  
Chief Justice 1941–1946

8 I seem to recall that cabinet wives were at home on Tuesday and have no idea who if anyone was on other days. The well-mannered guest would a few days later leave his card at the home of his hostess. A corner was turned over if it was delivered in person, and not if it was delivered by chauffeur, though it may have been the other way around.

9 I have no basis for this adverse judgment other than the deplorable book *The Brethren* by Woodward and Armstrong, which seems, despite their claim to more august sources, to be constructed almost entirely out of interviews with ex-law clerks.



The objective was a very succinct summary of the facts, the decisions below, the closely relevant authorities, and a recommendation as to grant or denial. Stone would only rarely go behind the memorandum and into the accompanying printed papers. The memorandum would also serve as a bench memorandum if the case moved forward to oral argument.<sup>10</sup> By the time mid-Term had been reached the steady flow of certiorari petitions had lost their novelty, but were yet far from being a crushing burden.<sup>11</sup> I do not recall any occasion when Stone would discuss with me how a case should be decided. He would sometimes, *sua sponte* or in response to my inquiry, explain why he had voted as he did, but he would never invite comment as to how he should vote at a future conference. It occurred neither to Stone nor to me that his task of judging would be aided by my views.<sup>12</sup>

Stone, for his part, was just as circumspect in observing our tacit territorial boundaries and would comment on my research or editing only in response to my rare inquiries.<sup>13</sup>

The usual course of opinion writing followed this path: Stone, after a variable period of reflection, would dictate a first draft, sprinkling "[cases]" throughout the text. I would then fall to revising the facts as necessary, conducting so much research as seemed necessary and feasible, and revising the text as fully as seemed to me desirable. I don't recall that Stone ever raised any question as to research, style or the addition or deletion of material. He would take that revision and dictate a next-to-final draft; this was done primarily for insurance, as he rarely made significant changes. It would then be time for literary polishing, to which I would devote considerable effort. His syntax tended to be

10 It was necessary in the frugal days of the 1934 Term to conserve rather than to squander the time of the law clerk. I believe it is now customary for each justice to take a memorandum-in-depth to the oral argument, sometimes including a list of penetrating questions in case the Justice wishes either further information from counsel or alternatively to display an impressive mastery of the case. I believe Frankfurter and Scalia, JJ, possessed minds sufficiently lively and pedagogical in nature to confound any effort to present an ordered oral argument, and to forestall other Justices, without prepared aids. I suspect, but do not know, that the other interjections from the bench have in recent years been pre-cooked.

11 About five years ago there was serious discussion of what seemed to me to be a foolish proposal, advanced by the Chief Justice, with surprising support from Paul Freund, to create a junior Supreme Court in order to relieve the nine Justices of some of their heavy burdens. In preparation for combat I obtained an estimate of certiorari times from the clerks who were my contemporaries. As I advised my contributors, "It is altogether remarkable that five men should by independent recollection come out so closely together in recalling a routine operation a half century in the past." The results were:

*Estimated Hours per Week*

<i>Oct. Term</i>	<i>Clerk</i>	<i>Stone, J.</i>	<i>Law Clerk</i>
1931	Gellhorn	4	30
1932	Wechsler	6-8	10-12
1933	Wearwood	2	15
1934	Gardner	1-2	12
1935	Harris	1	8

12 Bennett Boskey, a trustworthy observer, reports a different experience: "He enjoyed discussing with us the merits of the cases, and would be pleased when we uncovered some new facet that had been in danger of being overlooked." Boskey, *Mr. Chief Justice Stone*, 59 Harv. L. R. 1200 (1946). Either the Boskey views commanded more respect than mine, or Stone as Chief Justice had less time for reflection, or Bennett has blurred his clerkships and mingled Reed's habits, to which he had the year before been party, with those of Stone.

13 The only specific inquiry I can now recall concerned my inability to reconcile two recent opinions by Justice Holmes in respect of a troublesome tax issue. Stone told me to select whichever I chose and to ignore the other; "the old man in his later years paid no attention to precedent or authority, even his own."

awkward, and he would welcome rather than resist change. I would send the result to the printer and, after making any subsequent changes which occurred to either, sometimes covering several successive drafts, Stone would circulate it to the other Justices.

The work was exacting but not hard, either for the Justice or the clerk. Stone had usually been at work for about half an hour when I arrived at nine in the morning, and we would usually wind up the day with a half hour walk starting at six. Stone only rarely, if ever, worked at night or on Sundays; certainly his clerk did not, when it would be necessary to make entry through Mrs. Stone's domain in order to indulge any such diligence.<sup>14</sup>

Such were the boundaries of my job. With the possible exception of *Alaska Packers*, the law of the Supreme Court was changed in no whit by my clerkship. It served, however, as a very solid introduction to the Court upon which my next six years were to be focused, and gave me an acquaintance with an exceptionally good judge which I still cherish 54 years after the event.

### C. Justice Stone

After the death of Chief Justice Stone I was asked to contribute a commemorative piece to the Harvard Law Review. Forty-odd years later I can see nothing that calls for change, except for a few passages written too grandiloquently for an aged taste.<sup>15</sup> I shall out of current indolence rob the piece of a few passages, and risk the charge of self-plagiarism, surely the epitome of a victimless crime.

Stone "was not a man who – as Holmes, Brandeis or Cardozo – was entirely apart from the ordinary run of mankind. His law clerks observed, without any feeling of presumption, that in most respects he behaved much as do ordinary men, and had his full measure of ordinary human frailties. He was not an exceptionally gifted stylist, nor did he have the almost intuitive brilliance of thought which has eased – or at times embarrassed – the work of some of his colleagues. \* \* \* Perhaps one case in ten \* \* \* contained difficulties too great to be resolved by oral argument and briefs. The Justice in such cases would take hold of the problem and wrestle with it in remarkably close adherence to the rules of Aristotelian combat. \* \* \* The strength of his thinking, however, seemed to derive less from the force of his logic than from the fact that the conclusions so reached were no more than tentative. Each would be subjected to a painstaking examination, both as to the reasonableness and the practicality of the immediate result and as to the application of the rule in unforeseen circumstances."

Another "element in his work as a judge was his absolutely disinterested approach to a decision. As the Justice said, dissenting in *United States v. Butler*,<sup>16</sup> the widely divergent 'opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking and sound result, to emphasize ... that courts are concerned only with the power to enact statutes, not with their wisdom.' He had felt, in point of fact, that the Act in question was foolish, if not vicious, and that no sound economy could be

14 Brandeis took drastic steps to avoid any such social barrier to the full discharge of the clerk's duties. At least in Nathanson's day he was settled in a one room apartment one floor above the Brandeis' apartment. When he waked, presumably about six or seven, he would often find additional assignments from Brandeis pushed under his door.

15 For example, the opening and closing sentences: "Harlan Stone on April 22 laid aside his robes and his books and stepped into history. \* \* \* He has gone, but he has left the lamp he tended burning brighter." Gardner, *Mr. Chief Justice Stone*, 59 Harv. L. R. 1203, 1209 (1946).

16 297 U.S. 1, 78 (1936).



Back row, left to right: Owen J. Roberts (1930–1945), Pierce Butler (1923–1939), Stone, and Benjamin N. Cardozo (1932–1938). Front row, left to right: Louis D. Brandeis (1916–1939), Willis Van Devanter (1911–1937), Charles Evans Hughes (C.J. 1930–1941; also J. 1910–1916), James C. McReynolds (1914–1941), and George Sutherland (1922–1938). Courtesy of M.H. Hoeflich.

built upon the principle of scarcity. Yet his argument for the validity of the Act is one of the most vigorous and effective of his opinions.”

Stone had both respect and affection for his fellow dissenters – Holmes, Brandeis and Cardozo – but did not, at least in my day, seem to have a personal or intimate friendship with any of his brethren. He would on occasion make rather bitter complaint of the Chief Justice, who ran the Court very efficiently but upon the unmistakable premise that the associate justices were his subordinates.

I have no first-hand opinion, since I had by then slipped away from the curtilage of the marble temple, but Chief Justice Stone is reputed to have been ineffective, and too indecisive, in his management of the Court’s business. This, most assuredly, was the emphatic view of Felix Frankfurter.<sup>17</sup>

So far as I could tell my year with Stone was not the disaster for which my law review friends had hoped. He asked me to stay on for another year, but for all that I knew he may have viewed this as routine flattery of

17 My diary for June 17, 1946, has a long entry recording an intemperate complaint by Frankfurter over the laudatory tone of my Harvard article memorializing Stone:

Frankfurter discoursed for “1½ hours on Stone and related personalities of Supreme Court. He believes Stone was an incredibly vain man [said the kettle of the pot], easily influenced by ideas of others but resenting suggestions from his colleagues – in contrast to his law clerks – and a miserable leader of the Court. Agreed he was a slow but sure thinker and wholly devoid of personal predilection. Hughes a far more tactful and powerful man, according to Felix.”

Frankfurter had served on the Court under Hughes from 1939–1941 and Hughes was obviously a more tactful Chief than I had supposed if he could for two years avoid injury to Frankfurter’s by no means humble self-image.



the successive clerks.<sup>18</sup> I am sure that he was partially responsible for the recurrent efforts of Columbia to recruit me to their faculty, along with occasional other suggestions for useful occupation.<sup>19</sup>

### D. Particular Cases

The 1934 Term saw the first of the “New Deal” cases.<sup>20</sup> The earliest of these was *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). The National Industrial Recovery Act gave the President an unconstrained authority to forbid the interstate transportation of “hot oil,” that produced in excess of state regulatory limits. No decision, before or after, has applied standards as to the delegation of legislative power that were so strict, and I regretted that Stone did not join the felicitous periods of Cardozo’s dissent.<sup>21</sup> But the issues were blanketed, indeed smothered,

by inexcusably sloppy administration. The major count of the indictment was for violation of a section of the Petroleum Code which had, as was first developed in the Supreme Court argument, been repealed prior to indictment. Panama’s attorney put a pronounced Texas drawl to good use in describing his efforts to find the governing regulation in national, regional and state headquarters, only to find after the event that “the only copy of the law was in the hip pocket of the federal agent working in the next field to the east.” To that Texas attorney was *The Federal Register* due.

The *Gold Clause Cases*<sup>22</sup> sustained the power of Congress to abrogate provisions in bonds promising repayment in gold coin. This, notwithstanding four dissents, was not difficult as applied to private obligations. The hard question was whether the power to regulate money overrode the constitutional

18 In November 1989 I reviewed, courtesy of the Freedom of Information Act, the meager FBI files on me. Stone is reported to have told Agent Keefe in July 1935 that I “was the best secretary he ever had;” I believe Keefe to have made an erroneous rendition of the more reasonable “among the best.”

19 When I was Solicitor of Labor, Stone sent me to an old friend, whom I later discovered was the head of a very small and a very prosperous New York firm dealing with trusts and estates. I had misunderstood the antecedent phone call from Stone and thought he was interested in Government employment. I very graciously explained that he was too old (being perhaps 20 years younger than my present age). It is not conceivable that I should have considered joining this sort of decorous prosperity, but I still blush at my chagrin when I learned that he was in search not of a job but of a partner to whom he could transfer his work as he moved toward retirement.

Again, it was a refreshing contrast to the preoccupation of the 6th U.S. Army Group with the progress of the German divisions through the Ardennes, in the “Battle of the Bulge,” to receive a letter from Stone advising that he was holding up the appointment of the Court’s Reporter until I confirmed that I would not like to use that sinecure as a base for a lifetime of research and writing.

20 The three “big” cases had in common two features which today seem to me to be remarkable, although I have no recollection that they did at the time. One is that each of the five opinions was written by the Chief Justice; this probably reflected a view that this was the best way to produce an opinion that marched scrupulously down what seemed to Hughes to be the middle of the road, thereby minimizing dissent. It is also probable that the Chief Justice judged the cases sufficiently important that he should apply what he considered to be the Court’s best talent to their decision. The second feature is that the cases were decided in 27, 39 and 24 days after their argument. Hughes was a very fast worker, and had no doubts or second thoughts to slow him, but I have no idea how he managed to cajole or bully a dissenting opinion out of McReynolds, Van Devanter, Butler and Sutherland within 39 days of argument.

21 Thus: The President “is not left to roam at will among all the possible subjects of interstate transportation, picking and choosing as he pleases. \* \* \* There is no fear that the nation will drift from its ancient moorings as the result of the narrow delegation of power permitted by this section. \* \* \* The Constitution of the United States is not a code of civil practice.” [294 U.S. at 434, 443, 447].

22 *Norman v. B. & O. R. Co.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Perry v. United States*, 294 U.S. 330 (1935).

authority to borrow money “on the faith of the United States.” Hughes, who followed the command of a simple, forthright logic only so far as it illumined the road he wished to follow, wrote for four Justices. He held that the promise of the United States, to which its faith was pledged, could not be repudiated. But the damages due the plaintiff were only nominal, since a repayment in gold would invoke the valid power to requisition gold for which the holder would be repaid in legal tender.<sup>23</sup>

Stone had sold all of his government bonds as the cases approached the Court, so as to avoid any personal disqualification, but would have done so anyway. He had a precise, New England conscience about money matters, and a reverence for his country. He was heart sick at the Government’s repudiation, and said that he would never again purchase an obligation of the United States. Yet he, alone of the Justices, was prepared to accept the truism that the power to regulate money was granted the Congress, whether it was to exercise it honorably or dishonorably. He accordingly concurred in the judgment dismissing Perry’s complaint, but on the different ground that the statute was valid.<sup>24</sup>

I was, as shall later appear [editors’ note: in a chapter of *Pebbles From The Paths Behind* dealing with Gardner’s service in the Office of the Solicitor General], to become very frustrated as the Supreme Court set about in the next two years to dismantle the bulk of the New Deal legislation. I don’t, however, recall having ever felt that *Schechter Corp. v.*

*United States*, 295 U.S. 495 (1935) was wrongly decided. The National Industrial Recovery Act called for industry associations to formulate “codes of fair competition,” which prescribed wages, hours, prices or range of prices, acts of unfair competition, and whatever else occurred to the industry group. Upon approval by the federal administration the codes became enforceable law. The Court was unanimous in invalidating the code provisions as an improper delegation of legislative power, and also because wage and hour conditions in a Brooklyn slaughter house were not within the commerce powers of Congress. Cardozo concurred on the ground that this was “delegation run riot,” and “unconfined and vagrant” [295 U.S. at 553, 551]. None dissented.

There were no other great cases in the 1934 Term. A few others may deserve mention in the context of the clerk’s own life and times. I did the initial draft of only two opinions, a humility which would be considered unprofessional by most contemporary clerks. One was *Alaska Packers Ass’n v. Comm’n*, 294 U.S. 532 (1935), where I seem to have had the effrontery to advise Stone that my law school paper for Dowling and Cheatham had served to present him with an expert on conflict of laws. The second was *Awotin v. Atlas Exchange Bank*, 295 U.S. 209 (1935), where I believe Stone found the proper classification of a non-recourse note under the National Bank Act to be an issue too dull to face up to, at least initially.

It is also instructive, for one who has always

23 Either Stroock or Nathanson and I had agreed that we were very virtuous fellows not to make stock or bond investments prior to the decision (only Stroock had funds or credit sufficient to have done so). We would have been ruined, had we been corrupt, because the press and Wall Street for a day or two thought the Court was serious when it said the repudiation was invalid.

24 Perhaps the most extraordinary feature of the *Gold Clause Cases* was the coordinated agility of a Mr. McIntosh for Bankers Trust. He met the basic requirements for a leader of the New York bar: plump, white hair, with white piping under his vest, and much dignity. The gold clause iniquity so moved him that he flung up his arms in rhetorical passion. Out flew an impressive set of false teeth. McIntosh caught them, one handed, at chest level and restored them to his mouth without either a flicker of emotion or a perceptible break in his oratory.

been admiring of the luminous eloquence of the Cardozo prose, to remember a half-page joint concurrence by Stone and Cardozo in *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 434 (1935). When I returned from Cardozo's study bearing a page and a half of near poetry, Stone told me to sit down and strike out every unnecessary phrase and word. About two-thirds was lost to the world, and I never learned just how Stone explained the loss; it would be more wishful than accurate to say that he told Cardozo that his careless clerk had spilled some words while swinging the paper on his journey back.

There is one other case that deserves mention, but only in guarded whispers if there are young or innocent about. In December 1933 the Court voted 6–3 to affirm *Baltimore & C. Line v. Redman*, 295 U.S. 654 (1935). There the District Court had reserved a defendant's motion for directed verdict and then denied it after verdict for the plaintiff: The Second Circuit held the evidence insufficient to support the verdict but remanded for a new trial rather than entry of judgment for the defendant, giving excessive obeisance to the 7th Amendment as it was read in *Slocum v. New York Life Ins. Co.*, 228 U.S. 364. By middle December Stone had prepared and had in print a dissent, which he did not circulate but held awaiting Van Devanter's majority opinion. It arrived in June, and held the precise opposite of the position adopted by the Court in December. We put our still-born dissent in the scrap basket and said nothing to anyone. No Justice, in joining the now unanimous opinion, offered any comment known to Stone.

### E. The Good Old Days

Anyone who is completing his eighth decade knows full well that in his youth the snows

were deeper and the girls were prettier. If he is an attorney he knows as well (despite the immediately preceding paragraph) that the courts of old were more responsible in their adjudication.

A few years ago I devoted considerable effort in seeking to demonstrate that the lamentations led by Chief Justice Burger over the desperately overworked condition of the Court were baseless, and that they needed not a new intermediate court but only a reform of the excessively contentious habits that are now the fashion on the Supreme Court. As much of my case rested on a contrast with the 1934 Court, it may be appropriate to mention that concern at this point.

The Chief Justice based his cry for help on a rather shabby statistical sleight of hand. He asserted that "The best single measurement of the Court's work is its signed Court opinions," and that "in 1953, the first year of tenure of my distinguished predecessor Chief Justice Warren" the Court issued 65 signed opinions whereas in the October 1981 Term the Court issued 141 signed Court opinions, more than double the 1953 number.<sup>25</sup> I considered that Burger must have known, or surely should have known, that the October 1953 Term was preoccupied with *Brown v. Board of Education* and produced fewer signed opinions than any other in a half century past, while the signed opinions had averaged 157 a Term in the period 1928–1938.

I undertook to contrast the current Court with that of the 1934 Term. Then each Justice had a single law clerk; now he has four. Then the ordinary case set for oral argument was allowed two hours; it has since 1970 been one hour, with a saving of 150 hours of time per Term for each Justice. Another 20 hours a Term have been saved by abandoning the regular oral delivery of opinions and oral

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25 Annual Report on the State of the Judiciary, 69 ABA Journ. 442 (1983), pp. 1–2.

motions for bar admission. The Court usually rose in early June rather than early July. The mechanical gains in efficiency from a centrally housed Court, from word processing, xerox copying, and machine search of authorities must be formidable.

With all this, no Justice and no clerk in the 1934 Term was, so far as I know, overworked.<sup>26</sup> Today the justices and their clerks are cruelly, and demonstrably, overtaxed. The problem and its cure are vividly illustrated by a very simple table:

	1934 Term	1984 Term
Majority opinions	156	151
Concurring opinions	4	62
Dissenting opinions	14	117
	174	330

The 1934 Court, as seen through the eyes of Stone's clerk, was slow to offer concurrence or dissent, because each instance to some degree weakened the Court and diminished its authority. Except as matters of importance or principle seemed to compel protest, it was I believe considered on all sides that acquiescence was preferable to concurrence or dissent. Most surely, the Court would have been

horrified at the current practice by which nearly a tenth of the Court's opinions are festooned with multiple concurrences and dissents directed to a particular part or even paragraph of the principal opinion, such that the attorney or judge who needs to understand the decision must spend an hour dissecting it with the aid of a chart.

I am not alone in believing that many of the Court's problems derive from the prevalence of law clerks. With that much talented assistance, it is easy to slip into the view that there must be exhaustive research. With a bench memorandum prepared, in depth, for every argued case, often followed by close discussion in chambers, the Justice becomes the gladiator for his own law office, and cannot so readily shrug off a difference of opinion as unimportant.

I bundled off a 17 page memorandum, plus appendices, in March 1983, making these and related points, and addressed one to the Chief Justice and to each Associate Justice. I had warm and thoughtful replies from Powell and Stevens, JJ, and not so much as an acknowledgement from anyone else. The majority verdict seems clearly to have been that I was guilty of *lese majeste*. *GB*

26 I put aside the formidable work habits of Brandeis and his clerk as due to a fire within the Justice and not to the demands of the job.